APPEAL NO. 93331

On January 21, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing officer determined that the respondent (claimant herein) suffered a neck and shoulder injury which arose out of her (date of injury) work-related accident, and further determined that the claimant had not reached maximum medical improvement (MMI) as the great weight of the medical evidence was contrary to the opinion of the designated doctor that the claimant had reached MMI. The hearing officer decided that the claimant is entitled to temporary income benefits (TIBS) until her disability ends or MMI is reached. The appellant (carrier herein) contends that the hearing officer erred in his finding and conclusion concerning the neck and shoulder injuries and erred in his finding and conclusion concerning the great weight of the medical evidence being contrary to the opinion of the designated doctor. The carrier requests that the decision of the hearing officer be reversed and a decision rendered that the claimant reached MMI on May 20, 1992, with a one percent whole body impairment rating as reported by the designated doctor. No response was filed by the claimant.

DECISION

The decision of the hearing officer that the claimant sustained neck and shoulder injuries in her work-related accident of (date of injury), is affirmed. However, we conclude that the hearing officer erred in determining that the great weight of the medical evidence is contrary to the MMI opinion of the designated doctor. Accordingly, the decision of the hearing officer that the claimant has not reached MMI is reversed and a decision is rendered that the claimant reached MMI on May 20, 1992, with a one percent whole body impairment rating as reported by the designated doctor.

The parties stipulated that the claimant was employed by the employer on (date of injury), that the claimant "suffered an injury on (date)," and that "the injury" was accepted by the carrier as compensable under the 1989 Act. The issues at the hearing were: 1) whether the claimant sustained an injury to her neck and shoulder at the time of her injury to her hand on or about (date of injury), while in the employ of the employer, Dallas Woodcraft; 2) whether the claimant has reached MMI; and, 3) if the claimant has reached MMI, what is her impairment rating.

The claimant's testimony was translated from Spanish into English. Her testimony concerning how she was injured was not entirely clear. She testified to the effect that on (date of injury), she put a staple through a finger on her right hand while making wood frames at work. She said she got scared and pulled away from her machine leaving her fingernail behind. When asked what parts of her body hurt after the accident, the claimant said that "all my right hand side started hurting" and pointed to her neck, shoulder, and arm. She also said her hand hurt. The claimant said she went to a hospital for treatment of her injury and was thereafter treated by (Dr. G), until about April 1992. The claimant said that since

the accident "I have pain all the time," and that "I never felt anything since I was working there in my arm and I worked there seven years." She said she has not been able to work since her injury. She further stated that her right hand swells up all the time and that she feels pain when she moves her hand. She also said that her wrist hurts when she moves it.

In an Initial Medical Report dated May 29, 1991, Dr. G noted that he saw the claimant on May 28, 1991, just five days from the date of the accident. His clinical findings were stated as a complete avulsion of the right middle fingernail and guarded motion of the neck, right shoulder, right elbow, and right index finger secondary to pain and spasms. His diagnoses were "open wound of finger without mention of complication, sprain/strain cervical, sprain/strain shoulder (right), and sprain/strain wrist." His treatment plan included, among other things, physical therapy three times a week. Dr. G also completed several Specific and Subsequent Medical Reports up through January 1992. He continued with diagnoses of cervical sprain/strain and right shoulder spain/strain in July 1991. November 1991 and January 1992 reports indicate a compression neuropathy of the right wrist along with sympathetic dystrophy in relation to the injury to the index finger.

A July 1991 "Roentgen Study" of the claimant's cervical vertebrae revealed restricted motion which was said to be nonspecific but sometimes suggests a ligamentous muscular strain. A July 1991 bone scan suggested "some slightly increased uptake involving the right shoulder compared to the left." This finding was said to be nonspecific but could be secondary to trauma or to degenerative changes.

Dr. G referred the claimant to (Dr. B), an orthopedic surgeon, who examined the claimant on July 22, 1991, and diagnosed: 1) early reflex sympathetic dystrophy right arm; 2) somatic dysfunction cervical and lumbar spine, secondary to pull injury; and, 3) possible cervical radiculitis. He recommended x-rays and EMG and nerve conduction studies with (Dr. F).

On July 30, 1991, Dr. F reported that electromyographic examination of the right upper extremity, bilateral lower extremities, and related paraspinal muscles was normal, that there was no evidence of acute or chronic denervation, and that there was no evidence of neuropathy, myopathy, or radiculopathy. He also reported that a nerve conduction study of the right upper extremity and lower extremities revealed a compressive neuropathy involving median sensory conduction across the wrist to the second and third fingers. Dr. F's impression was: 1) crush injury to the right finger with secondary sympathetic dystrophy; 2) compressive neuropathy of the right wrist; 3) cervicodorsal/costovertebral strain and sprain with secondary myofascial pain; and, 4) medial and lateral epicondylitis of the elbow. He recommended median nerve blocks, possibly cervical epidural blocks, and physical therapy to desensitize the hand.

(Dr. J), examined the claimant at the request of the carrier on July 8, 1991, and reported that the claimant had either an early case of reflex sympathetic dystrophy versus some sort of localized hand or finger problem such as osteomyelitis or an erosive osteoarthritis. He also said that the claimant's right shoulder pain was difficult to explain other than the claimant carrying her right upper extremity in a protective manner resulting in an overuse syndrome of the right shoulder. Dr. J next examined the claimant on February 5, 1992, at which time he diagnosed 1) status post minor crush injury to right index finger, and 2) somatization disorder. He noted that there was no evidence of reflex sympathetic dystrophy, that a bone scan was essentially normal, that x-rays were normal, and that there was no abnormal bone "deposition" in the right hand. Dr. J stated that "I fail to believe this individual is as impaired as she is trying to put on." He further stated that "I don't believe her neck or shoulder injury have any sort of proximity or relationship to the work injury." In a Report of Medical Evaluation (TWCC-69), Dr. J certified that the claimant reached MMI on February 5, 1992, with a five percent whole body impairment rating. Dr. J noted that the claimant "has not changed since I evaluated her the last visit." However, in assigning the impairment rating, he used a 1990 revised edition of the AMA Guides to the Evaluation of Permanent Impairment instead of the edition of the AMA Guides provided for in Article 8308-4.24 which is to be used to determine impairment.

In a Benefit Review Conference Agreement dated April 30, 1992, the parties requested the Commission to designate a doctor because they could not agree on a designated doctor. The Commission selected (Dr. D), as the designated doctor. In the same agreement, one issue is stated as "will the carrier accept the shoulder & neck?" The resolution of that issue is stated as "the parties agree that claimant will see [Dr. BU] for evaluation. Carrier will decide whether or not to accept the neck & shoulder pending [Dr. BU's] report."

Dr. D, the designated doctor, specializes in hand surgery and upper extremity reconstructive surgery. He examined the claimant on May 20, 1992, and certified in a TWCC-69 that the claimant reached MMI on May 20, 1992, with a one percent whole body impairment rating. The impairment was for the right index finger. On the TWCC-69 form Dr. D stated: "Patient has only some residual stiffness of the PIP joint of the right index finger. Her carpal tunnel compression symptoms seem to have settled fully but she has been warned that that could act up in the future. This, therefore, has not been part of the impairment rating." In a narrative report dated May 20, 1992, Dr. D gave findings on his physical examination of the claimant, reviewed the claimant's medical records, and diagnosed "some residual stiffness at right index finger after crush staple injury, one year ago." Dr. D noted that Dr. F or Dr. B had referred the claimant to (Dr. S), whose reports were not in evidence, and that when Dr. S last examined the claimant on November 22, 1991, he felt that the claimant had reached MMI and had impairment related only to her finger. He further stated:

I have explained to the patient through an interpreter today that as part of her initial

> injury she must have also strained muscles in her forearm, arm and neck in an attempt to pull the right arm back. All of this seems to have settled down and in fact, at this time, the right index finger is doing relatively well. The patient is still concerned that the finger remains stiff, but I have explained to her that in fact, at this time, she should be using it as normally as possible. I can see at this time no signs of any reflex sympathetic dystrophy or carpal tunnel syndrome which has been mentioned previously. For this reason, I feel that the patient should be using her hand as normally as possible. I do feel that she needs to be monitored from the point of view of the carpal tunnel compression which was previously present, but at this time, there does not appear to be much inflammation related to it.

In an Initial Medical Report dated June 23, 1992, Dr. BU, an orthopedic surgeon, noted that he had seen the claimant on June 18, 1992, and diagnosed reflex sympathetic dystrophy. He indicated that another EMG was to be performed. Dr. BU referred the claimant to (Dr. M), for an EMG examination. On July 8, 1992, Dr. M reported that the EMG was abnormal, and that his findings were consistent with 1) carpal tunnel syndrome on the right, chronic and severe; 2) median digital II cutaneous branch neuropathy on the right, severe; 3) radial digital II cutaneous branch neuropathy on the right, severe; and, 4) cubital tunnel syndrome on the right, chronic and moderate to severe in nature. In a medical report dated July 14, 1992, Dr. BU gave the same diagnosis as in his initial report, stated that "EMG and nerve conduction velocity revealed median nerve compression at the wrist as well as ulnar nerve compression at the elbow," and further stated that "she is probably going to need surgery." In a report dated September 10, 1992, Dr. BU diagnosed reflex sympathetic dystrophy, carpal tunnel syndrome, and ulnar nerve neuritis. He stated that the claimant failed conservative care for carpal tunnel and ulnar nerve compression at the elbow and that he and the claimant discussed her "upcoming surgery."

In a letter to the carrier dated September 15, 1992, Dr. BU wrote that all of the claimant's workups for neck and shoulder were normal, and that her neck and shoulder pain are related to carpal tunnel syndrome and ulnar nerve neuritis at the elbow "both of which were related to the injury she described to her hand." Dr. BU further stated that "no other cause could be determined, including laboratory workup." Dr. BU also asks the carrier for consideration of surgery consisting of an ulnar nerve decompression and carpal tunnel release. In a "To Whom It May Concern Letter" of December 15, 1992, Dr. BU wrote that the claimant has a documented carpal tunnel syndrome "which my impression is, is related to her work related injury." He further stated that surgery had been denied by the carrier and that the claimant also has severe cubital tunnel syndrome. He recommended that the claimant get a "good second opinion from a reputable upper extremity surgeon" and named two doctors.

Having reviewed the record, we conclude that there is ample evidence to support the hearing office's determination that the claimant suffered neck and shoulder injuries which arose out of her work-related accident of (date of injury). Evidence supporting that determination includes the claimant's testimony, Dr. G's medical reports indicating shoulder and neck sprain or strain, Dr. F's EMG report indicating cervical strain and sprain, and Dr. D's medical report indicating that the claimant must have strained muscles in her arm and neck when she pulled her arm back. While there is evidence contrary to the hearing officer's determination, such conflicts in the evidence are for the hearing officer to resolve as the trier of fact. *See* Texas Employers Insurance Company v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer judges the weight and credibility to be given to the evidence. Article 8308-6.34(e). We also conclude that the hearing officer's determination that the claimant sustained neck and shoulder injuries is not against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951).

The second issue on appeal concerns the hearing officer's determination that the claimant has not reached MMI because, as concluded by the hearing officer, the great weight of the other medical evidence is contrary to the opinion of the designated doctor, Dr. D, that the claimant reached MMI on May 20, 1992.

"MMI" means the earlier of: (A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonable medical probability; or (B) the expiration of 104 weeks from the date income benefits begin to accrue. Article 8308-1.03(32). Since Dr. D rendered his opinion on MMI prior to the expiration of 104 weeks from the date income benefits began to accrue, we are concerned in this case with the first part of the definition of MMI. Pursuant to Article 8308-4.25(b), the report of the designated doctor concerning whether the employee has reached MMI has presumptive weight and the Commission must base its determination as to whether the employee has reached MMI on that report unless the great weight of the other medical evidence is to the contrary. We have previously held that it is not just equally balancing evidence or a preponderance of evidence that can overcome the presumptive weight given the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. No other doctor's report, including that of a treating doctor, is accorded the special presumptive weight given to the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992. In regard to impairment rating, Article 8308-4.26(g) provides that the report of the designated doctor selected by the Commission concerning the employee's impairment rating has presumptive weight and the Commission must base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary, in which case the Commission shall adopt the impairment rating of one of the other doctors. In the instant case, there is evidence that three doctors believe that the claimant has reached MMI. Dr. J certified that the claimant reached MMI on February 5, 1992, Dr. D, the

designated doctor, certified that the claimant reached MMI on May 20, 1992, and according to the report of Dr. D, Dr. S felt that the claimant had reached MMI in November 1991. Dr. D's report is to the effect that except for some residual stiffness in the claimant's finger, all of the claimant's problems have resolved, including forearm, arm, and neck strains. He also could find no sign of reflex sympathetic dystrophy or carpal tunnel syndrome. On the other hand, Drs. M and BU are of the opinion that the claimant has carpal tunnel syndrome and cubital tunnel syndrome, and Dr. BU relates those conditions to the claimant's work-related injury and recommends surgery. However, Dr. BU suggests that another opinion be obtained from an upper extremity surgeon. We observe that Dr. D, the designated doctor, specializes in hand and upper extremity surgery and he found no sign of reflex sympathetic dystrophy or carpal tunnel syndrome, but found only some residual stiffness in the claimant's finger. While there is conflicting medical evidence on the issue of whether the claimant has reached MMI, having reviewed the record, we conclude that the hearing officer erred in determining that the great weight of the medical evidence is contrary to the opinion of the designated doctor that the claimant reached MMI as of May 20, 1992. *See* Appeal No. 92412, *supra*; Appeal No. 92366 *supra*; Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993; Texas Workers' Compensation Commission Appeal No. 93311, decided June 7, 1993. *Compare* Texas Workers' Compensation Commission Appeal No. 93293, decided June 1, 1993.

The hearing officer's decision is affirmed in part and is reversed and rendered in part. The hearing officer's determination that the claimant sustained injuries to her shoulder and neck in her work-related accident of (date of injury), is affirmed. The hearing officer's determination that the claimant has not reached MMI is reversed and a decision is rendered that the claimant reached MMI on May 20, 1992, with a one percent impairment rating as reported by the designated doctor.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge